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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES, PETITIONER

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the Court of Claims entered in the above cases on June 7, 1955 and November 8, 1955.

OPINION BELOW

The opinion of the Court of Claims in all three cases (App. B, pp. 25–29) is reported at 131 F. Supp. 919.

JURISDICTION

The judgment of the Court of Claims in *Western Pacific* was entered on June 7, 1955 (App. B,

p. 28). On the same date, entry of judgments in the *Bangor* and *Seaboard* cases was suspended pending determination of the exact amounts due (App. B, p. 28). A timely motion for rehearing in all three cases was denied by the Court of Claims on October 4, 1955 (App. B, p. 30). On November 8, 1955, the Court of Claims, after determination of the exact amounts due, entered judgments in *Bangor* and *Seaboard* (App. B, pp. 31, 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16 (3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether the high, first-class tariff rates on explosive and incendiary bombs, which are intended to reimburse carriers for the heavy and unusual transportation expenses resulting from the necessity that such bombs be carried in accordance with the Interstate Commerce Commission Regulations on "Explosives and Other

Dangerous Articles," apply to steel bomb cases when these cases are filled with non-incendiary, non-explosive, and non-hazardous material and are *not* subject to the Regulations.[1]

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C. 1 *et seq.*, are set out in Appendix A, *infra*, pp. 23–24.

STATEMENT

These actions were brought in the Court of Claims by respondent rail carriers to recover the difference between tariff rates actually paid and those allegedly applicable to 211 Government shipments of steel bomb cases filled with Napalm gel. About 200 of the shipments were made over the lines of respondents Bangor and Seaboard in 1944 (R. 75, 101–102). The remaining shipments were over respondent Western Pacific's lines in 1948 and 1950 (R. 5, 23). The record in these cases discloses the following pertinent facts:[2]

Napalm gel is gasoline which has been thickened or gelatinized by the addition of aluminum soap powders (R. 48, 53, 163). This mixture is not capable of spontaneous combustion, is not self-

[1] If certiorari is granted, we wish to reserve the right to brief and argue the additional question whether respondents Bangor and Seaboard were estopped from claiming that the high, first-class rates applied to the shipments over their lines. See R. 100–109.

[2] All record references are to the pages of the certified transcript filed in the office of the Clerk.

igniting, and is not, therefore, incendiary (R. 163–165); like wood, paper, and a host of other articles, it will burn if ignited, but some outside incendiary agent must be supplied to set it on fire (R. 163, 168).

In a completed incendiary bomb, capable of functioning as such, the incendiary agent which ignites the Napalm gel is contained in the burster charge (R. 163, 164, 168). The burster is a steel tube inserted in the nose of a bomb and extending through its center, which contains a column of explosive TNT and a column of white phosphorous (R. 24, 49). The function of the explosive is to rip open the steel bomb case and scatter its contents (R. 24). The white phosphorous is the incendiary or self-igniting agent, which ignites in the air when blasted out by the explosive charge and sets the Napalm gel on fire (R. 24). In addition, a complete incendiary bomb contains a fuze. The fuze is a device in the nose of the bomb which, on impact, sets off a primer cup with a small explosion sufficient to fire the burster (R. 24). The burster and fuze represent more than 75% of the construction cost of a complete bomb, whereas the steel case and Napalm filler comprise less than 25% of the cost (R. 49).

It is undisputed that the shipments involved contained neither the burster nor the fuze and that they therefore did not contain either the incendiary element, i. e., the white phosphorous,

or the explosive element, i. e., the TNT (R. 5, 14, 83, 93). The only bomb parts shipped, as already noted, were the steel cases filled with gasoline which had been thickened by the addition of aluminum soap powders for the purpose of retarding the gasoline's free-flowing qualities (R. 46, 51, 164).

These steel bomb cases filled only with Napalm gel were similar to a "steel container filled with gasoline, with the exception that the Napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline" (R. 164). Indeed, a "bomb body filled with Napalm Gel * * * presents considerabl[y] less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 46). In light of these facts, the Bureau of Explosives, which enforces the Interstate Commerce Commission's Regulations on "Explosives and Other Dangerous Articles" (49 C. F. R., Parts 71–78, published as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*), has consistently ruled that a Napalm-filled bomb case, shipped, as here, without fuze or burster, is "not a dangerous article or an explosive article" subject to the Regulations and hence is "not required to be shipped in accordance with the * * * regulations" (R. 64, 65, 67).

The Government, claiming that the tariff rates for the shipments in question should be the same fifth-class rates applicable to gasoline in steel drums or containers, paid the carriers on that basis (R. 2, 72, 87). The carriers, asserting that the proper rates were the high, first-class rates established by Item 1820 of the Freight Classification for a complete incendiary or explosive bomb,[3] filed their petitions in 1954 in the Court of Claims to recover the difference (R. 1, 71, 85).

The Government's answers, claiming that Item 1820 is inapplicable, denied that any additional sums were due respondents (R. 7, 77, 89). Respondents then moved for summary judgment, relying on *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390, and asserting that the facts and issues in that case and in the instant ones were identical (R. 11, 81, 91). Opposing these motions, the Government submitted uncontroverted affidavits to show the non-applicability of Item 1820 (R. 45–69, 110–113, 161–175).

[3] The Official Classification Committee, a railroad organization which authors and publishes the Consolidated Freight Classifications and assigns classification ratings, had ruled, as early as November 1943, in response to a request from the Army, that the high, first-class rates of Item 1820 do not apply to shipment of bomb cases filled only with Napalm gel because such shipments "were not a finished bomb in that they needed a powder charge and primer and that they were not dangerous" (R. 170). This ruling was in effect during the 200 shipments in 1944 in the *Bangor* and *Seaboard* cases and remained "in effect at least until June 26, 1945" (R. 171).

The Government took the further position that, if the court below was nevertheless of the view that Item 1820 applied, there was then presented a question of reasonableness of the application of these high, first-class rates to the non-hazardous shipments involved (R. 37–38). The Government, on this aspect of the case, urged the court to suspend the proceedings and allow that question to be referred to and determined by the Interstate Commerce Commission as the only body empowered to pass on the reasonableness of railroad tariff rates (R. 38).

The Court of Claims, dividing three to two, adhered to its *Union Pacific* ruling and held that Item 1820 applied (App. B, p. 26). In addition, while recognizing the "Government's right to have the reasonableness determined" by the Interstate Commerce Commission, the court held that the running of the two-year statute of limitations destroyed that right (App. B, p. 26). The court accordingly granted the carriers' motions for summary judgment and entered judgments of $14,280.06 for Western Pacific, $73,056.95 for Bangor, and $28,561.93 for Seaboard (App. B, pp. 28, 31, 32).

The dissent of Judge Madden, in which Chief Judge Jones joined, stated that the majority's opinion results from the "kind of pure literalism ha[ving] no place in the law" (App. B, p. 29). The dissent noted that "the whole reason and justification for charging high rates for the carriage of

objects is their incendiary and extra-hazardous character;" that the carriers "do not attempt to justify the high rates [demanded by them here] on the basis of high hazards;" and that, under the court's judgment, "our Government and our taxpayers are made to pay for insurance against non-existent risks, and the railroads are getting something for nothing" (App. B, pp. 28, 29).

REASONS FOR GRANTING THE WRITS

While ruling that the two-year limitation period of Section 16 (3) of the Interstate Commerce Act, App. A, pp. 23–24, does not bar suits by carriers against the United States for additional transportation charges, the Court of Claims has held in the instant cases that the running of the same two-year period deprives the Government of its right to referral of the issue of the rates' reasonableness to the Interstate Commerce Commission, concededly the only body authorized to pass thereon. Since the Government is thus prevented from asserting the unreasonableness of the rates as a defense, the effect of the holding below is that, at the same time that the Government is deprived of the benefit of the two-year limitation as a shield to ward off the carriers' suits, the carriers are free to invoke the provision as a sword to destroy the Government's right to establish its defense on the merits. Not only is there nothing in the Act or its history to indicate a congressional intent to achieve such a grossly

uneven result, but the holding below is in square conflict with *United States* v. *Kansas City Southern Railway Company,* 217 F. 2d 763 (C. A. 8). This limitations question is a recurring one[4] and the holding below has important bearing on numerous pending and prospective suits.

In the circumstances, we believe it appropriate that the Court also review the related question whether the Court of Claims erred in construing the tariffs. That court's construction—one which requires the Government "to pay for insurance against non-existent risks" (dissenting opinion, App. B, p. 29)—not only leads to carrier windfalls of approximately $115,000 in the instant cases; applied to other carriers of similar shipments, it will confer windfalls estimated by the General Accounting Office at more than $20,000,000.

1. The holding below that referral to the Interstate Commerce Commission for a determination as to reasonableness of the tariff rates was precluded because of the expiration of the two-year limitation period provided in Section 16 (3) of the Interstate Commerce Act is in square conflict with *United States* v. *Kansas City Southern Ry.*

[4] The same issue is presented in *United States* v. *Chesapeake & Ohio Railway Company*, 224 F. 2d 443 (C. A. 4), in which a petition for a writ of certiorari is being filed concurrently. See, also, *Lehigh Valley Railroad Company* v. *United States*, Ct. Cls. No. 30–54 (decided November 8, 1955), where, in a situation identical to that in the present cases, the Court of Claims again refused referral to the Interstate Commerce Commission and granted the carrier's motion for summary judgment.

Co., 217 F. 2d 763 (C. A. 8). In the *Kansas City Southern* case, the Government had brought an action to recover alleged overcharges in connection with the transportation of export grain. The District Court, determining that the carrier had charged the established tariff rate and that the validity of the Government's claim depended upon the resolution of administrative questions, dismissed the suit. The Government thereupon filed a motion to set aside the order of dismissal and to hold the case in abeyance until the resolution of those questions could be obtained from the Commission. The motion was denied.

Accepting the District Court's view as to the administrative nature of the questions involved, the Eighth Circuit vacated the dismissal and remanded the cause for such further proceedings as the District Court might deem appropriate to obtain the necessary Commission determination. Noting that "[a]ny right to resort to the Interstate Commerce Commission as a matter of independent and plenary proceeding clearly would now be wholly barred [by limitations],"[5] the court observed that only by holding the action in abeyance and submitting the administrative questions to the Commission would the public treasury be protected (217 F. 2d at 769). In its petition for rehearing, the carrier protested the sanctioning of a referral on the ground, among others, that the two

[5] The transportation services had been rendered between April 1945 and August 1946.

years provided in Section 16 (3) had run. In denying rehearing, the Eighth Circuit once again laid stress upon the propriety of a referral after the limitations period had run, reiterating (217 F. 2d at 770) that this circumstance

> * * * had left the situation where the Interstate Commerce Commission now was without any power under the statute to grant reparation relief in an administrative proceeding, and that the only way therefore that it presently was possible to safeguard such public interest as might be involved would be "by a holding of the present action in abeyance and allowing the administrative questions to be submitted to the Interstate Commerce Commission for answer, on the basis of their incidence in the judicial proceeding."[6]

The *Kansas City Southern* case was pressed upon the Court of Claims (see R. 42); the court below, however, refused to accept the Eighth Circuit's holding and ruled to the contrary.

2. Despite the fact that Section 16 (3) states no exceptions, the Court of Claims has consistently held that the two-year limitation period established thereby does not apply to suits brought by carriers against the United States. *Seaboard Air*

[6] See also *Northern Pacific Ry. Co.* v. *United States*, 213 F. 2d 366 (C. A. 8). It is significant that in that case, where the two-year period provided in Section 16 (3) had also run, the Court of Appeals *sua sponte* directed referral; neither party to the proceeding had made a request for referral at any stage.

Line Railroad Co. v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U. S. 848; *Union Pacific Railroad Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U. S. 930.[7] This ruling, which was not challenged in the instant cases because of the prior decisions, opened the way to consideration of the claims against the United States here asserted by respondents. Now, the Court of Claims has ruled that the very two-year limitation period which is inapplicable to these carrier actions brought against the United States nonetheless inhibits the Government in defense of these suits.

It cannot be denied that if the Government could establish the unreasonableness of the rates demanded by the carriers it would constitute a complete defense on the merits. Nor can it be challenged that the determination of such a question of reasonableness is within the exclusive province of the Interstate Commerce Commission. See, *e. g., Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The court below has itself fully recognized, in *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390,

[7] Under these decisions the only limitation period applicable to carriers' suits against the United States is the general six-year period provided in the Tucker Act. 28 U. S. C. 2501. The instant actions, while filed after expiration of Section 16 (3)'s two-year period, were filed within the six-year period.

involving similar shipments of Napalm-filled bomb bodies, that (125 C. Cls. at 394)

> * * * [t]his [reasonableness] question is not within our jurisdiction, however, as *the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission.* [Emphasis supplied.]

Similarly, a long line of decisions by this Court and the lower courts firmly establishes the need for a court to stay its hand when, in the course of litigation, there arises an issue appropriate for determination only by the Commission. Thus, in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 147, which involved a question appropriate for Commission determination, the Court declared:

> * * * in a long line of cases beginning with *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, *the court should stay its hand until the Commission has passed on the matter.* * * * *That course is singularly appropriate here.* [Emphasis supplied.]

Again, in a comparable case, *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 433, the Court stated:

> When it appeared in the course of the litigation that an administrative problem,

> committed to the [Interstate Commerce] Commission, was involved, *the court should have stayed its hand pending the Commission's determination* of the lawfulness and reasonableness of the practice under the terms of the Act. *There should not be a dismissal, but, as in Mitchell Coal Co.* v. *Pennsylvania R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding.* [Emphasis supplied.]

Accord: *Smith* v. *Hoboken R. Co.,* 328 U. S. 123; *Mitchell Coal Co.* v. *Penna. R. R. Co.,* 230 U. S. 247, 267; *City of New Orleans* v. *Texas & N. O. R. Co.,* 195 F. 2d 882, 887 (C. A. 5); *S. S. W., Inc.* v. *Air Transport Ass'n of America,* 191 F. 2d 568, 664 (C. A. D. C.); *United States* v. *Kansas City Southern Railway Company,* 217 F. 2d 763, 770 (C. A. 8); *Arizona Sand & Rock Co.* v. *Southern Pacific,* 280 I. C. C. 285; *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, 343; see also *Nathanson* v. *Labor Board,* 344 U. S. 25, 30; *United States* v. *Morgan,* 313 U. S. 409, 422.

On the basis of these settled principles, the Government, raising a question of reasonableness in the instant proceedings, moved to stay the proceedings pending a referral of the question to the Commission. The court below, however, brushed aside the motion, holding that Section 16 (3)'s two-year "statute of limitations has run

against the Government's right to have the reasonableness determined" (App. B, p. 26).[8]

The unfairness and incorrectness of this holding are manifest. Since Section 16 (3), as construed by the court below, allows a carrier to file suit after the two-year period has expired, and since in such a suit the United States cannot, under the holding below, establish the defense of unreasonableness because of the expiration of the same two-year period, it is obvious that any carrier seeking to collect charges which are unreasonable and in violation of the Interstate Commerce Act may do so with impunity by merely waiting the two years before filing suit.

Nothing in Section 16 (3) compels such an uneven result. Nor do any of the four decisions relied on by the court below furnish any support for the court's holding. *Midstate Co.* v. *Penna.*

[8] While the court's opinion does not in express terms refer to Section 16 (3)'s two-year limitation period, it is plain from the four cases cited by the court on that question (App. B, p. 26) and from the arguments of respondents below (R. 136, note 4) that the court had in mind the two-year period of Section 16 (3). Respondents asserted in the court below, relying on the same four cases later cited in the court's opinion, that the court lacked authority to refer the question of reasonableness to the Commission because "Sec. 16 (3) (b) and (e) of the Interstate Commerce Act, Title 49 U. S. Code" requires that proceedings "must be filed with the Commission within two years after delivery of the shipments" (R. 136, note 4).

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R. Co., 320 U. S. 356, simply holds that Section 16 (3)'s limitation period bars a carrier's action action against *a private shipper*, even though the shipper agreed to waive the bar. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, applies the limitation period to bar a suit by a *private shipper* against a carrier. These cases, which were concerned with actions between private shippers and carriers, do not touch the issue here. There was, of course, no occasion to consider the peculiar position in which the United States, as a shipper, has been placed by the Court of Claims' determination that Section 16 (3)'s limitation period applies to a carrier's action against all shippers *except the United States.*

The two Interstate Commerce decisions, holding that the United States may not institute an independent reparation proceeding against a carrier after the two-year period has expired (*United States* v. *Director General*, 80 I. C. C. 143, 150–151; *United States* v. *Southern Railway Company*, 286 I. C. C. 203), do not support the result below. While we believe that those Commission decisions are unsound,* it is sufficient to point out that

*It is doubtful that the limitation provision in Section 16 (3) is to be applied against the United States, proceeding as complainant, in the absence of express language making the limitation applicable to the sovereign. Cf. *DuPont* v. *Davis*, 264 U. S. 456, 462, in which this Court held the provisions of Section 16 (3) inapplicable to a suit to recover demurrage charges accruing during a period of federal control of the railroads on the ground that the

the question here was not whether the United States is barred from filing an independent reparation proceeding against the carrier before the Commission but whether the court was barred from exercising its power to refer the question of reasonableness to the Commission, as an incident to a judicial proceeding timely filed before it and brought *against* the United States by the carrier.

Furthermore, far from justifying a refusal to refer, the Commission's rulings, if they are to be given effect, underscore the need for such a reference. As the Eighth Circuit pointed out in the *Kansas City Southern* case, *supra,* p. 11, the presumed unavailability of an independent ad-

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action was on behalf of the United States. It is also to be noted that the rationale of the Court of Claims' holdings that the carriers are not bound by the two-year term in suing the United States would compel equally the conclusion that the United States is not subject to that limitation in proceeding against carriers. The rationale of the Court of Claims was stated in *Seaboard Air Line R. Co.* v. *United States*, 113 C. Cls. 437, 447, as follows:

"The Transportation Act of 1940 and its predecessors were general statutes regulating commerce generally. Its provisions had to do with various and sundry aspects of commerce both on the land and the sea. The carriage of government property and the mail was dealt with, but Congress was chiefly concerned with the carriers' relationship to each other and with the private shipper. This was the subject uppermost in the mind of Congress when the Acts were passed. We feel reasonably confident that when Congress said a carrier must bring its suit for its charges within two years, it did not have in mind suits against the Government."

ministrative remedy reinforced the need for the court below to stay its hand and refer the reasonableness question to the Commission as an incident of the judicial proceeding. See also *Arizona Sand & Rock Co.* v. *Southern Pacific Co.*, 280 I. C. C. 285.[10]

Finally, a reference in such circumstances gives effect to the basic precept that courts and administrative agencies are "collaborative instrumentalities of justice." *United States* v. *Ruzicka*, 329 U. S. 287, 295; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620–622. The power of the courts

[10] In the *Arizona* case, the carrier instituted suit in the United States District Court for the District of Arizona to collect demurrage charges on shipments of cement. The shipper contended the charges were inapplicable and unreasonable. By order of the court, the proceedings were stayed to permit a determination by the Commission as to the issues raised by the respective parties. The matter was thereupon referred to the Commission, where the carrier interposed the defense that the limitation provisions of Section 16 of the Interstate Commerce Act had run as to some of the services in controversy. The Commission agreed that the limitation period had run but rejected the defense, noting that "it is the practice of the Commission to assist the court in instances of the kind stated in [its] order" and that "[a]ppropriate findings and a declaratory order in proceedings such as this are authorized by section 5 (d) of the Administrative Procedure Act" (280 I. C. C. at 286). Accordingly, it passed upon all of the questions posed by the court's order, made the appropriate determinations, and transmitted a certified copy of its report based thereon to the District Court for the latter's guidance.

generally is available in order to enable the administrative agency to function effectively in carrying out congressional policies. The prohibition against unreasonable railroad charges in the Interstate Commerce Act is an explicit declaration of basic congressional policy. Accordingly, the power of the court below to refer the "reasonableness" question should have been exercised so as to enable the Commission to carry out that policy. Otherwise, the United States in this case and in all other cases in which the carrier postpones filing suit until after expiration of the two-year period will be deprived of its right to obtain a determination over which the Commission has exclusive jurisdiction and which, if obtained, would enable the Government to establish a complete defense to the suits.

3. The application by the court below of the high, first-class rates of Item 1820 to the shipments here involved misconceives the basic purpose of those rates. The high, first-class rate applicable to explosives and other dangerous articles under Item 1820 has traditionally been based on the consideration that the transportation of such articles is "attended with great risk," that "heavy expenses are incurred [by the carriers] in conforming to [the I. C. C.] regulations," and that the "first class" rate is therefore the proper rate "to apply on this traffic." *Rates on Powder and*

High Explosives, 151 I. C. C. 155, 163; *Austin Powder Co.* v. *Wheeling & L. E. Ry. Co.,* 156 I. C. C. 334, 337; *DuPont De Nemours & Co.* v. *B. & O. R. R. Co.,* 128 I. C. C. 705, 706. There is, however, no great risk nor tremendous potential liability attendant upon the transportation of the relatively safe Napalm-filled bomb bodies involved in the present cases. And the carriers do not incur any "heavy expense" in transporting the non-explosive and non-incendiary Napalm-filled bomb bodies because concededly they are *not* subject to the I. C. C. Regulations and hence are free from the strict packing, marking, loading, and handling requirements imposed by the Regulations. *Supra,* p. 5. Application of Item 1820 to these shipments thus forces the Government to reimburse the carriers for "heavy expenses" they do not incur, and, as Judge Madden's dissent observes, "our Government and our taxpayers are made to pay for insurance against non-existent risks, and the railroads are getting something for nothing" (App. B, p. 29).

The fact that applying Item 1820 to the shipments here involved would compensate the carriers for additional expenses which they have not in fact incurred is, of course, pertinent to the question of the reasonableness of such a rate application. But it is also relevant to the question of tariff interpretation, for, like any other instru-

ment, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness."[11]

Here, there is no obstacle to such a reading. It appears from the terms of Item 1820, the related provisions in the Freight Classification, and from the uncontroverted affidavits in the record, that "in order for an article to be rated" under Item 1820, "it must be an article which itself is subject to regulation under *Topping's Tariff I. C. C. No. 4.* These regulations are promulgated by the Interstate Commerce Commission and are published in the Code of Federal Regulations at 49 C. F. R., Parts 71–78" as the Commission's Regulations on "Explosives and other Dangerous Articles" (R. 57, 63). Since Napalm-filled bomb cases are *not* subject to the Regulations, it follows from the terms of Item 1820 that, contrary to the holding below, they should not be classified under the first-class rates of Item 1820.

[11] Application of the Item 1820 rate here would be manifestly unfair. Indeed, respondents have not even challenged that unfairness and do not attempt to justify the high rates on the basis of high hazards (R. 183). Furthermore, the plain implication of an earlier opinion of the court below in another Napalm-filled bomb body case was that application of the Item 1820 rate to the type of shipment here involved would be unfair. *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390, 393, 394.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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DECEMBER 1955.

APPENDIX A

The Interstate Commerce Act, § 16 (3) (24 Stat. 384, as amended, 49 U. S. C. 16 (3)), provides in pertinent part:

> (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the Carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> (d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for

recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * * *

APPENDIX B

1. Opinion of the Court of Claims in the *Western Pacific, Bangor,* and *Seaboard* Cases and Judgment of the Court in the *Western Pacific* Case

In the United States Court of Claims

(Decided June 7, 1955)

No. 42–54

The Western Pacific Railroad Company

v.

The United States

No. 104–54

Bangor and Aroostook Railroad Company

v.

The United States

No. 250–54

Seaboard Air Line Railroad Company

v.

The United States

Mr. Lawrence Cake for the plaintiff.

Mr. Morton Hollander, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant. *Mr. Martin E. Rendelman* was on the briefs.

ON PLAINTIFFS' MOTIONS FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

LARAMORE, *Judge,* delivered the opinion of the court:

These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390. A reconsideration of the question of classification of the articles as "bombs or mines" under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case.

The Government's contention that these cases should be suspended pending the referral to the Interstate Commerce Commission for a determination as to the reasonableness of the rates, is without merit. The statute of limitations has run against the Government's right to have the reasonableness determined. *A. J. Phillips Company* v. *Grand Trunk Western Railway Company,* 236 U. S. 662; *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.,* 320 U. S. 356; *United States* v. *Director General,* 80 I. C. C. 143, 150–151; *United States* v. *Southern Railway Company,* 286 I. C. C. 203.

The defendant contends that a question of fact exists as to whether the plaintiffs Bangor and Aroostook Railroad Company and Seaboard Air Line Railroad Company are estopped from claiming the higher rate. The defendant says these plaintiffs are estopped from recovering the higher rate for some of the shipments because the Official

Classification Committee, which is "a creation of the railroads," on November 23, 1943, orally and subsequently in writing, informed the Army that the proposed shipments without bursters or fuses were not dangerous and ruled that they should be rated by analogy as empty aerial bombs under item 1895, which was a lower rate than item 1820. This ruling was subsequently rescinded and admitted to be a mistake by the Committee and also by the defendant in the *Union Pacific Railroad* case, *supra.* We do not see how the defendant could reasonably have been misled or injured by the ruling, especially when the plaintiffs promptly billed the defendant at the first-class rate and the defendant paid that rate and continued to make the shipments at that rate. Moreover, the only cases cited by the defendant on the availability of the defense of estoppel to the Government in these railroad cases are *Oregon-Washington Railroad & Navigation Company* v. *United States,* 255 U. S. 339 and *Western Pacific Railroad Company* v. *United States,* 255 U. S. 349. Both of these cases involved the acceptance by the railroad of shipments at the lower rate and gross acquiescence in the shipments at that rate. The Supreme Court held that the railroads were precluded from recovering the higher rate because of their gross acquiescence. There is no acquiescence in these cases. The railroad billed and was paid the higher rate and suit was commenced shortly after the Government set off the sums here in suit against money otherwise due the plaintiffs. See *St. Louis, Brownsville & Mexico Railway Company* v. *United States,* 268 U. S. 169.

Plaintiffs' motions for summary judgment are granted. Judgment will be entered for The Western Pacific Railroad Company in the amount of $14,280.06. Judgment in Bangor and Aroostook Railroad Company and Seaboard Air Line Railroad Company is suspended pending the filing of a stipulation of the exact amount due, or upon failure of filing a stipulation within 45 days the cases will be referred to a commissioner of this court for a report on the amounts due.

It is so ordered.

WHITAKER, *Judge,* and LITTLETON, *Judge,* concur.

MADDEN, *Judge,* dissenting.

"Give a dog a bad name and hang him" is a saying of the people, but it is not a legal maxim. It is hard to think of a name for the inert, non-incendiary objects here involved other than "incendiary bombs." That is what the objects were made for; if they are not used for that purpose they must be scrapped. If a sightseer in a factory asked what those queer-shaped objects were, the answer would be "incendiary bombs." But if he then started to run, he would be given further reassuring information about them.

In law, as in life, words are used for a purpose, and a mere name may be all that is needed in one situation while in another many qualifying words will have to be appended to the name. Where, as in the instant case, the whole reason and justification for charging high rates for the carriage of objects is their incendiary and extra-hazardous character, the mere name is not sufficient to put goods in their proper classification. If we go by

the name, our Government and our taxpayers are made to pay for insurance against nonexistent risks, and the railroads are getting something for nothing.

In other branches of the law such as laws forbidding the transportation or storage of explosives, a court would make short work of a case involving explosives that would not explode. I see no reason why the law of freight rates should be less rational. "Reason is the life of the law." If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it.

The plaintiffs do not attempt to justify the high rates on the basis of high hazards. They simply say, it is so written in the tariffs. Incendiary bombs, high rates. These are incendiary bombs. *Ergo,* high rates. This kind of pure literalism has no place in the law.

I would dismiss the plaintiffs' motion for summary judgment and let the Government prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them. Our *Union Pacific* case, is, of course, not *res adjudicata* of this case which involves other plaintiffs. If we should be persuaded in this case that our decision in that case was wrong, we would regret that error, but not repeat it.

JONES, *Chief Judge,* joins in the foregoing dissent.

2. ORDER OF THE COURT OF CLAIMS DENYING THE MOTION FOR REHEARING IN THE *Western Pacific, Bangor,* AND *Seaboard* CASES

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 and 54 of the Rules of this court and, on consideration thereof,

It is ordered this fourth day of October, 1955, that said motions be and the same are overruled as follows:

* * * * *

42–54 The Western Pacific Railroad Company.
104–54 Bangor and Aroostook Railroad Company.
250–54 Seaboard Air Line Railroad Company. Defendant's motion.

* * * * *

By the COURT:

(S) Marvin Jones,
MARVIN JONES,
Chief Judge.

3. Judgment of the Court of Claims in the *Bangor* Case

In the United States Court of Claims

No. 104–54

Bangor and Aroostook Railroad Company

v.

The United States

ORDER

On June 7, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On October 24, 1955, said stipulation was filed signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that the amount due plaintiff is $73,056.95.

Now, therefore, it is ordered this eighth day of November, 1955, that judgment be and the same hereby is entered in favor of plaintiff in the sum of seventy-three thousand fifty-six dollars and ninety-five cents ($73,056.95).

By the Court:

Marvin Jones, *Chief Judge.*

4. Judgment of the Court of Claims in the *Seaboard* Case

In the United States Court of Claims

No. 250–54

Seaboard Air Line Railroad Company
v.
The United States

ORDER

On June 7, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On October 24, 1955, said stipulation was filed signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that the amount due plaintiff is $28,561.93.

Now, therefore, it is ordered this eighth day of November, 1955, that judgment be and the same hereby is entered for plaintiff in the sum of twenty-eight thousand five hundred sixty-one dollars and ninety-three cents ($28,561.93).

By the Court:

Marvin Jones, *Chief Judge.*

U. S. GOVERNMENT PRINTING OFFICE: 1955